



6450-01-P

DEPARTMENT OF ENERGY

10 CFR Part 430

Energy Conservation Program: Energy Conservation Standards for Dishwashers, Notification of Petition for Rulemaking

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notification of petition for rulemaking; request for comment.

SUMMARY: On March 21, 2018, the Department of Energy (DOE) received a petition from the Competitive Enterprise Institute (CEI) to define a new product class under the Energy Policy and Conservation Act (EPCA) for residential dishwashers. The new product class would cover dishwashers with a cycle time of less than one hour from washing through drying. Through this notification, DOE seeks comment on the petition, as well as any data or information that could be used in DOE's determination whether to proceed with the petition.

DATES: Written comments and information are requested on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Interested persons are encouraged to submit comments, identified by "Dishwasher Petition," by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue, SW., Washington, D.C., 20585-0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

Hand Delivery/Courier: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza, SW., Suite 600, Washington, D.C., 20024. Telephone: (202)-586-6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Docket: For access to the docket to read background documents, or comments received, go to the *Federal eRulemaking Portal* at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585. E-mail: Elizabeth.Kohl@hq.doe.gov; 202-586-7796.

SUPPLEMENTARY INFORMATION: The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., provides among other things, that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." (5 U.S.C. 553(e)) Pursuant to this provision of the APA, CEI petitioned DOE for the issuance of a new rule, as described in this notification and set forth below, verbatim¹. In promulgating this petition for public comment, the Department of Energy is seeking views on whether it should grant the petition and undertake a rulemaking to consider the proposal contained in the petition. By seeking comment on whether to grant this petition, the Department of Energy takes no position at this time regarding the merits of the suggested rulemaking.

On March 21, 2018, CEI petitioned DOE to initiate a rulemaking to define a new product class under 42 U.S.C. 6295(q) for residential dishwashers. (The petition is presented at the end of this document.) The new product class would cover dishwashers with a cycle time of less than one hour from washing through drying. CEI did not suggest specific energy and water

¹ Attachments and data submitted by CEI with its petition for rulemaking are available in the docket at <http://www.regulations.gov>.

requirements for this new product class, stating that these details could be determined during the course of the rulemaking. CEI stated that dishwasher cycle times have become dramatically longer under existing DOE energy conservation standards, and that consumer satisfaction/utility has dropped as a result of these longer cycle times. CEI also provided data regarding the increase in dishwasher cycle time, including data that correlated increased cycle time with DOE's adoption of amended efficiency standards for dishwashers.

CEI cites to section 6295(q) of EPCA as the authority for DOE to undertake the requested rulemaking. Section 6295(q) requires that DOE, for a rule prescribing an energy conservation standard for a type (or class) of covered products, specify a level of energy use or efficiency higher or lower than the level that applies (or would apply) to such type (or class) for any group of covered products that have the same function or intended use, if DOE determines that covered products within such group either: (1) consume a different kind of energy from that consumed by other covered products within such type (or class); or (2) have a capacity or other performance-related feature that other products within such type (or class) do not have, and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class). In making a determination under paragraph (q) concerning whether a performance-related feature justifies a higher or lower standard, DOE must consider such factors as the utility to the consumer of the feature, and other appropriate factors. In any rule prescribing a higher or lower level of energy use or efficiency, DOE must explain the basis on which the higher or lower level was established. CEI asserts that given the significant amount of consumer dissatisfaction with increased dishwasher cycle time, cycle time is a "performance-related feature" that provides substantial consumer utility, as required by EPCA for the

establishment of a product class with a higher or lower energy use or efficiency standard than the standard applicable to other dishwasher product classes.

CEI also cites to 42 U.S.C. 6295(o)(4), which prohibits DOE from prescribing a standard that interested persons have established by a preponderance of the evidence would likely result in the unavailability in the United States in any covered product type (or class) of performance characteristics, features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of DOE's finding. CEI states that despite this prohibition, it appears that dishwasher cycle times have been impaired by the DOE standards and that many machines with shorter cycle times are no longer available.

In its petition, CEI proposes a cycle time of 1 hour as the defining characteristic for the suggested new product class, because 1 hour is substantially below all current products on the market. CEI states that energy efficiency standards for current products would therefore not change with the addition of the new product class, and that no backsliding would occur for the energy standards already in place. Specifically, 42 U.S.C. 6295(o)(1) prohibits DOE from prescribing a standard that increases the maximum allowable energy use, or in the case of showerheads, faucets, water closets or urinals, water use, or decreases the minimum required energy efficiency, of a covered product.

Submission of Comments

DOE invites all interested parties to submit in writing by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]** comments and information regarding this petition.

Submitting comments via <http://www.regulations.gov>. The <http://www.regulations.gov> web page will require you to provide your name and contact information prior to submitting comments. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <http://www.regulations.gov> information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through <http://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through <http://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large

volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that

<http://www.regulations.gov> provides after you have successfully uploaded your comment.

Submitting comments via hand delivery, or mail. Comments and documents submitted via hand delivery or mail also will be posted to *<http://www.regulations.gov>*. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information in your cover letter each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) a description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

DOE considers public participation to be a very important part of its process for considering rulemaking petitions. DOE actively encourages the participation and interaction of the public during the comment period. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in determining how to proceed with a petition. Anyone who wishes to be added to the DOE mailing list to receive future notices and information about this petition should contact Appliance and Equipment Standards Program staff at (202) 586-6636 or via e-mail at *ApplianceStandardsQuestions@ee.doe.gov*.

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notification of petition for rulemaking.

Issued in Washington, DC on April 18, 2018.

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March 21, 2018

Via E-mail: The.Secretary@hq.doe.gov, john.cymdalsky@ee.doe.gov,

daniel.cohen@hq.doe.gov

The Honorable Secretary Rick Perry
Office of the Secretary of Energy
U.S. Department of Energy
1000 Independence Ave. SW
Washington, D.C. 20585

RE: Petition for Rulemaking on a New Product Class of Fast Dishwashers

The Competitive Enterprise Institute (CEI), submits this petition for rulemaking under 5 U.S.C. § 553(e). We request that the Department of Energy (DOE) begin a rulemaking process to define a new product class under 42 U.S.C. § 6295(q) for residential dishwashers. The new product class would cover dishwashers with a cycle time of less than one hour from washing through drying. We are not proposing specific energy and water requirements for this new product class, in the belief that these details can be determined during the course of the rulemaking.

Dishwasher cycle times have become dramatically worse under DOE standards, and consumer satisfaction has dropped as a result. The DOE itself has acknowledged that this is caused by its regulations, noting that: “To help compensate for the negative impact on cleaning performance associated with decreasing water use and water temperature, manufacturers will typically increase the cycle time.”¹

A survey of 11,000 dishwasher owners by GE Appliances demonstrates that cycle time is one of the four biggest sources of dissatisfaction of consumers.² Excerpts from several dozen consumer complaints received by another organization are contained in an attachment to this petition.³ Some typical comments are:

- “The cycle time is way too long, running for 4 hours and still not

cleaning the dishes. I am currently in the process of hand washing a number of dishes that did not clean in last night's 4-hour cycle.”

¹ DOE, 2016-11-22 Final Rule Technical Support Document, chapter 3 at page 330 (Nov. 22, 2016), <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0021-0029>.

² Kelley Kline, *GE Appliances Comments on DOE's NOPR for Energy Conservation Standards for Residential Dishwashers*; Docket No. EERE-2014-BT-STD-0021; RIN 1904-AD24, page 4 (March 25, 2015), <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0021-0026>.

³ Details of consumer complaints, including names and locations, discussed in this petition are attached in Appendix A. All the consumer complaints contained in this petition were provided directly by the consumers, without prompting, to Consumer Affairs, an online consumer resource center not affiliated with any government agency or other consumer organization, and are available on their website at <http://consumeraffairs.com/>.

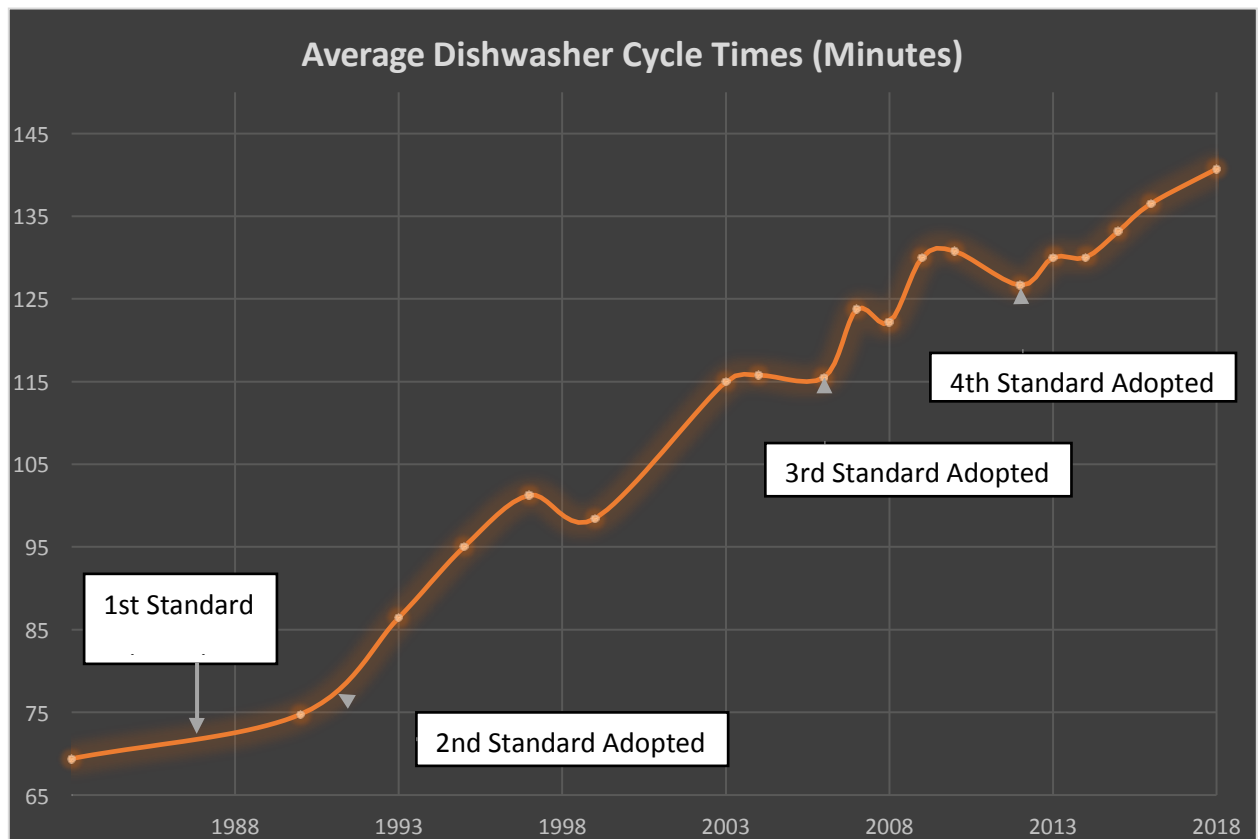
- “They take forever and forever to run the shortest cycle.”

Several other analysts have also noticed that dishwasher cycle times have increased due to the DOE regulations, such as the following publications attached to this petition:

- *Why do new dishwashers take so long to complete a normal cycle?*⁴
- *Why newer dishwashers run for an alarmingly long time.*⁵
- *Why it's the Government's Fault Your Dishwasher Cycle Is 2 or 3 Hours Long.*⁶

While the DOE had estimated the average cycle times of dishwashers to be about one hour in its most recent rulemaking,⁷ this figure appears to be decades out of date. As the chart below shows, the average cycle time has not been close to an hour since 1983, before any standards were adopted. The current average cycle time is actually 2 hours 20 minutes, and has more than doubled due to the current energy standards.⁸

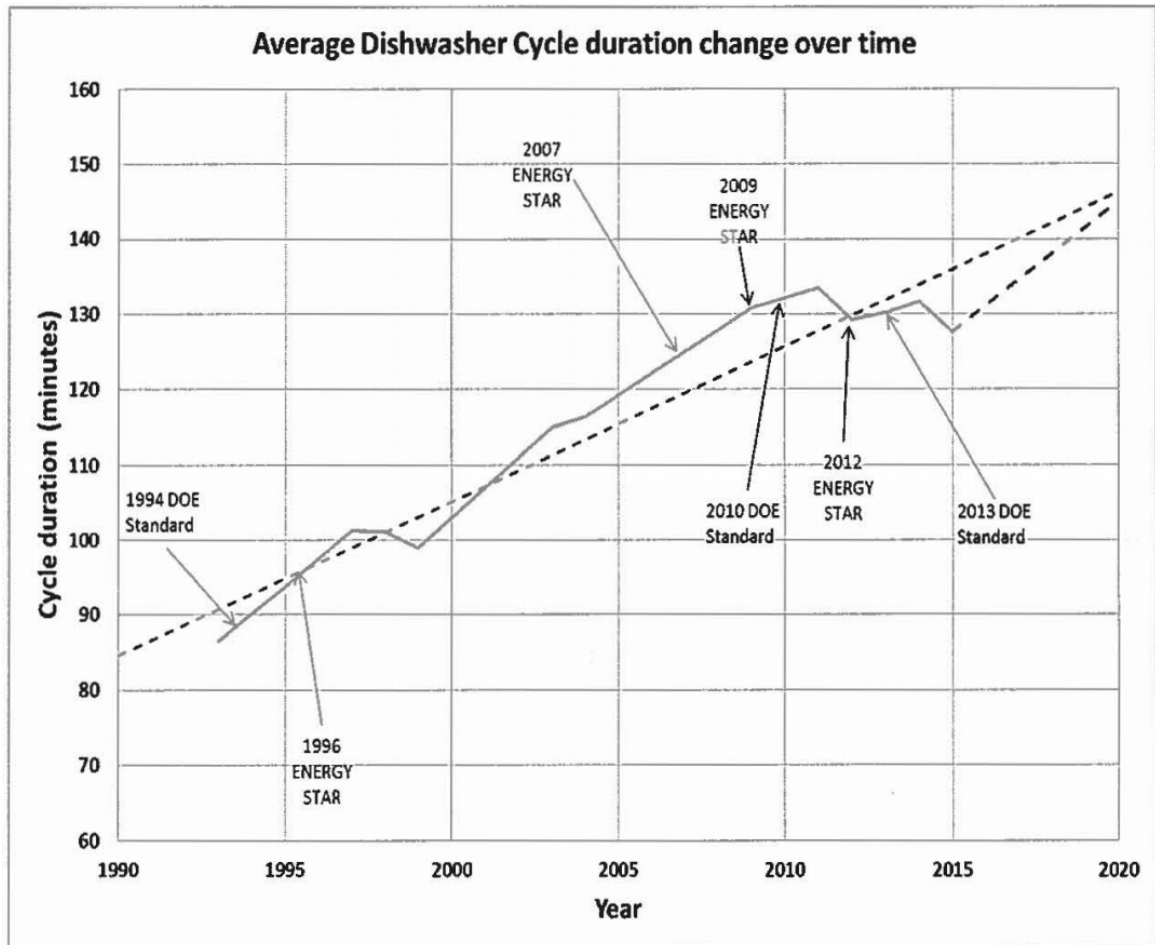
We examined the *Consumer Reports'* evaluation of dishwasher cycles times for 19 of the last 35 years along with the cycle times of the current 177 models on the ConsumerReports.org website. This is how cycle times have changed over the last 35 years:



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- ⁴ Ed Perratore, *Why do new dishwashers take so long to complete a normal cycle?*, Consumer Reports (April 23, 2014), <https://www.consumerreports.org/cro/news/2014/04/why-does-my-new-dishwasher-take-so-long/index.htm>.
- ⁵ Philip Jang, *Why newer dishwashers run for an alarmingly long time*, Times Colonist (June 24, 2014).
- ⁶ David Kreutzer, *Why it's the Government's Fault Your Dishwasher Cycle Is 2 or 3 Hours Long*, Daily Signal (July 12, 2015).
- ⁷ 81 FR 90087 n.22 (“The 1-hour cycle time is an estimate of the typical cycle time for a dishwasher.”).
- ⁸ On a per model basis as reviewed by Consumer Reports.

As this graph shows, when a new energy standard is adopted by the DOE, the result is an increase in dishwasher cycle time. In 1978, *Consumer Reports* found that “A dishwasher’s regular cycle time typically takes about an hour.”⁹ In 2014, ConsumerReports.org warns consumers: “don’t expect normal cycles to drop anytime soon from their 2- to 3-hour mark,” specifically citing the DOE regulations as the cause.¹⁰

CEI’s assessment is based on publically available sources such as *Consumer Reports*, but industry data provide further evidence of the degradation of cycle times. In the 2015-16 rulemaking, GE Appliances evaluated cycle time changes over time as they relate to various regulatory changes by the DOE. Below is the chart provided by GE Appliances¹¹:



The Association of Home Appliance Manufacturers (AHAM) collected data “from manufacturers making up over 90 percent of the market [which] show that as energy use decreases, cycle time (including dry time) gets longer.”¹² AHAM also analyzed shipment-weighted average cycle times, which weight each model by sales. It found the shipment-

⁹ Consumer Reports, May Issue, 281 (1976).

¹⁰ Perratore, *supra* note 4.

¹¹ Kline, *supra* note 2, at 3.

¹² Jennifer Cleary, *AHAM Comments on DOE's NOPR for Energy Conservation Standards for Residential Dishwashers*; Docket No. EERE-2014-BT-STD-0021; RIN 1904-AD24, page 8 (March 25, 2015), <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0021-0021>.

weighted average cycle time is 1.76 hours.¹³ As this is below the average-per-model cycle time, this demonstrates that consumers tend to prefer models with lower cycle times.

In addition to energy efficiency, consumers also want dish washers that clean better, clean quicker, clean quieter, and dry better. Congress understood that imposing energy standards could have a negative impact on these other features and tasked the DOE with making sure these other features stayed available to consumers. That is why 42 U.S.C § 6295(o)(4) requires that all new standards establish “by a preponderance of the evidence” that they will not result in the unavailability of any performance “characteristics (including reliability)” and “features.” Despite this, it appears that dishwasher speed cycles has been seriously impaired by the DOE standards and that many machines with shorter cycle times are no longer available to consumers.

In enacting the National Appliance Energy Conservation Act of 1987, Congress sought to ensure “that energy savings are not achieved through the loss of significant consumer features.” H.R. Rep. No. 100-11, 22 (1987). The “purpose of this provision is to ensure that an amended standard does not deprive consumers of product choices and characteristics, features, sizes, etc.” *Id.* at 23. This should “preclude[] DOE from promulgating a standard that manufacturers are only able to meet by adopting engineering changes that eliminate performance characteristics.” *Id.* at 23. Unfortunately for consumers, this has not happened.

We are now in a situation in which dishwashers average cycle times of less than one hour have been eliminated from the marketplace. Of the current 177 models reviewed by *ConsumerReports.org*, the fastest cycle time was the Frigidaire model FBD2400KS at 90 minutes. This is not due to consumer choice, but because it is not technologically feasible to create dishwashers that both meet the current standards and have cycle times of one hour or less. But Congress provided the DOE with discretion to deal with exactly this kind of situation.

Under 42 U.S.C. § 6295(q), Congress “permitted the Secretary to establish different standards within type of covered product . . . based upon performance-related features of the product.” National Energy Conservation Act 1978, H.R. Rep. 95-1751, 115 (1978). According to Congress, the “purpose of the provision is to permit the minimum energy efficiency standards to account for the varied performance-related features of appliances within a given type of product.” *Id.* Congress directed the Secretary to “use his discretion carefully, and establish separate standards only if the feature justifies a separate standard, based upon the utility to the consumer and other appropriate criteria.” *Id.* at 116. Given the degree of consumer dissatisfaction with dishwasher speed, we submit that exercising this discretion is fully warranted in this case.

This provision specifically allows the Secretary to “specify a level of energy use or efficiency . . . lower than that which applies (or would apply) for such type (or class).” 42 U.S.C § 6295(q)(1). The only relevant requirement is that it “have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class). In making a determination under this paragraph concerning whether a performance-related feature justifies the establishment of a higher or lower standard, the

¹³ *Id.*

Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate.” 42 U.S.C § 6295(q)(1)(B).

A cycle time of less than one hour is a “performance-related feature” which justifies a lower standard based if there is “utility to the consumer of such a feature.” To demonstrate this utility, consider consumers’ views on the subject:

- “The cycles run FOREVER - Plan on letting it run all afternoon before your dishes are ready so you can use them for dinner!!”
- “It doesn't clean well, but has a very long cycle, well over two hours.”
- One consumer described a cycle time of one and a half hours as “extremely long,” but sadly this is the shortest cycle time on the market.
- Another consumer had a “technician come out to see why it took 6 hours to go through the cycle” and the technician told her she “needed to prewash my dishes before loading”. (This, however, is directly contrary to the advice of the DOE, which views prewashing as wasting energy and water.)
- “It spontaneously starts beeping, non-stop, the cycle takes FOREVER. I hate it, I hate it, I hate it.”
- When one consumer called a technician to complain of a 4.5 hour cycle time, she was told that the new machines just take longer than the old ones.

Given these consumer complaints, which are just a small sample, and the GE Appliances’ survey of 11,000 dishwasher owners, it is clear that cycle time is a “performance-related feature” that provides substantial “utility to the consumer” as required by the statute.

This petition proposes one hour as the defining characteristic for a new dishwasher class, because this is substantially below all current products on the market. This means that the energy efficiency standards for current models will not change with the addition of this new product class. Regardless of the standard set for this proposed new class, no backsliding would occur for the energy standards already in place as this new standard will not apply to current models.

Dishwasher speed is an important factor for huge numbers of consumers. Manufacturers clearly have the ability to satisfy these consumers, and the DOE has the discretion under the law to accommodate them. It should do so.

Sincerely,

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